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Supreme Court of the United States

OCTOBER TERM, 1905.

No. 144

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON, AND ALFRED W. CARTER, TRUSTEES UNDER THE WILL OF BERNICE P. BISHOP, DECEASED, PLAINTIFFS IN ERROR.

vs.

THE TERRITORY OF HAWAII, DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

(Filed by leave of Court given in open Court December 13, 1905.)

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THE TERRITORY OF HAWAII, DEFENDANT IN ERROR.

Reply Brief for Plaintiffs in Error.

(Filed by leave of Court given in open Court December 13, 1905.)

The brief of defendant in error is, for the most part, a reiteration of propositions which were fully considered in the briefs filed in the Damon case (194 U. S., 154). Their treatment, however, in the brief filed here perhaps calls for explanation on the part of the plaintiff of some phases which might otherwise tend to confuse or mislead the Court.

The Territorial Court in that case, as in this, ruled directly that the Hawaiian statutes were not grants, and that no vested rights could be acquired under them, and was as directly reversed by this Court upon both points. We are content to rest this portion of the case upon the authority of the Damon case, and upon the reasoning and authorities cited in our principal brief.

With respect to the proposition now advanced that "the fishery right claimed by plaintiffs in error (if any ever existed) was lost because not presented to the Land Commissioners for award," it will be noted that this point did not enter at all into the decisions arrived at by either of the courts below, their rulings being simply that the right never existed except as a revocable license, so that the question of the loss, by failure to present to the Land Commissioners, of a right which never existed, neither did nor could arise. There is an incidental reference to the authority of the Land Commission to award fisheries, which is a necessary premise to the contention now made, at p. 28 of the record, where, in considering whether or not the fishery passed as an appurtenance to the land, and holding that it did not, the Court remarked: "This construction of the statute is further supported by the fact that the Land Commission, although given authority to award 'rights of piscary' by statute creating it (Statute Laws, Vols. I and II, Sec. 7, p. 109), refused to award fisheries either as 'rights or territory,' except in a very few instances, leaving the parties to their rights under the general statutes. *Akeni v. Wong Ka Mau*, 5 Haw. 91."

So far as that part of this statement is concerned that declares that the Land Commission refused to award fisheries, leaving the parties to their rights under the general statutes, the quotation is supported by the case cited and is correct. The learned Court, however, has inserted both an exception and a new proposition as to the authority of the Land Commission under the statute, neither of which is found in the case cited, and in doing so, we respectfully submit, fell into grave error. Not only was no authority given the Land Commission to award rights of piscary, but it refused to award fisheries, basing its refusal expressly and solely upon an absence of authority so to do.

The Land Commissioners had jurisdiction over claims to land only. They had no jurisdiction to award or refuse to award fishing rights. They held, repeatedly, that they were without jurisdiction over fishing rights. No appeals were taken from any of these decisions, but they were acquiesced in for over half a century, and are the foundation of valuable property rights.

That the Land Commissioners had no jurisdiction over fishing rights can be shown both on principle and authority. By the statute creating that Commission, land, and land only, was to be the subject of claims and awards. The statute can be found in Revised Laws of Hawaii (1905), p. 1160.

The Act is entitled, "Of the Board of Commissioners to Quiet Land Titles," and its principal provisions are as follows:

"Section I. His majesty shall appoint through the Minister of the Interior, and upon consultation with the privy council, five commissioners, one of whom shall be the attorney-general of this kingdom, to be a board for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act; the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the Minister of the Interior upon the applicant."

"Section VII. The decisions of said board shall be in accordance with the principles established by the Civil Code of this kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy—primogeniture and rights of adoption; which decisions, being of a majority in number of said board, shall be only subject to appeal to the Supreme Court, as prescribed in the act to organize the judiciary, and, when such appeal shall not have been taken, they shall be final.

"Section VIII. All claims to land against the Hawaiian government, which are not presented to said board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article, shall be deemed to be invalid, and shall be forever barred in law, unless the claimant be absent from this kingdom, and have no representative therein."

The remaining sections, which relate to the procedure of the Commission, also support the contention that the

Commission had jurisdiction over nothing but land, as for example:

"We will carefully and impartially investigate all claims to *land* submitted to us," etc.

Form of oath of commissioners Sec. 2.

"The undersigned have been appointed * * * a board of commissioners to investigate and confirm or reject all claims to *land* arising," etc. * * *

"All persons are required to file with the board specifications of their claims to *land*, and to adduce the evidence upon which they claim title to any *land* in the Hawaiian Islands," etc.

Form of advertisement Sec. 5.

It is entirely evident from the language of this act that the Board in question was created to determine the validity of claims by individuals to land, and to lands only.

Not only so, but the only reference to piscary rights contained in the act is the provision in Sec. 7, that the decision of the Board, in passing upon the disputed claims specified, should be in accordance with the principles established by the Civil Code of the kingdom, in regard to the prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, etc., etc. Not only does the title of the act indicate that the powers of the board were expressly restricted to 'quieting land titles,' but the act in its entirety shows the same restrictive legislative intent.

Compare these definite provisions with the language

of Sec. 7 relied upon by the defendant. Where is the language to warrant the conclusion that the matters enumerated in that section are to be subjects of award? If so, the Board was given "express authority" to award the rights of women, the rights of absentees, primogeniture and rights of adoption. Absurdity of construction could go no further.

The matter could be lightly dismissed were it no so important. Not only are these fisheries involved, but "water privileges," the most valuable assets in the Hawaiian Islands and the foundation of their chief industry, stand upon precisely the same footing. A decision of this Court that "water privileges and rights of piscary" were within the jurisdiction of the Land Commission, and, if not awarded, are barred, would destroy millions of dollars' worth of property at a stroke.

That the Land Commission itself decided that it was without jurisdiction to consider claims to fisheries is well known to every student of the laws of Hawaii. The decisions themselves are usually endorsed on the awards as made, and, while on record in the Land Office in Hawaii, have never been published. A decision of the Supreme Court, however, refers to and affirms the contemporaneous construction of the statute by the Board of Land Commissioners, to the effect that the Board was without jurisdiction to award fisheries. In Arkeni *v.* Wong Ka Mau, 5 Haw., 91, cited below to show that the Board had authority to award such rights, the opinion of the Boundary Commission, which the Court affirmed, on the contrary, distinctly declares:

> "I find in repeated instances that the Board declines to award and define piscary rights, leaving parties to their rights under general statutes: *e. g.*, in the award to Kiahua, Vol. 10, p. 50, where the fishing right was surveyed and included in the land asked for, the Board expressly refused to award this portion of the survey, remitting the claimant to the law, indorsing this refusal both on the notes of survey in the award and on the accompanying plat, and no instances of a contrary practice are shown to me."

The award to Kahanaumaikai of record in Vol. 10, page 58 of Awards, referred to in this decision, contains the following remarks at the foot of the Award.

> "Remarks: The sea appurtenant to this land can not be awarded for same in the same manner as real property; but Kahanaumaikai can elect (to chose) one kind of fish in that sea according to law and can set apart the same in such manner as may not conflict with the intent of the law. By order of the Land Commissioners.
>
> "September 22, 1852."

The diagram contains the following notes.

> "The survey of this Apana 6, relative to sea, has been set aside and rejected; but the right to take fish according to law still exists; but this Apana can not be awarded as a kuleana. By order of J. W. Nowlein, Clerk."

The leading case of Haalelea v. Montgomery (2 Haw. 62), is also valuable as contemporaneous construction. In that case as in this there was no mention of the fishery in the Award, and yet the Court held that the

fishery was private property under the statute, the language of the Court being:

> "Under this statute, as we understand it, the entire fishing ground, lying between low water mark and the outer edge of the coral reef * * * along the seaward front of the Ahupuaa of 'Honouliuli,' was the private property of M. Kekauonohi, possessed and held by her as such, subject to the piscatorial rights of the tenants living on that Ahupuaa."

The refusal of the Land Commission to entertain jurisdiction of claims for fisheries has stood unquestioned as the law of the Islands for over half a century, and property rights of the most important and valuable character have been acquired, dealt with, and now rest, upon the faith of this ruling.

This is not a question of the effect of the Organic Act or of the annexation of the Islands. If the contention be correct, the plaintiffs not only have no fishery to-day, but they never had one. Yet not only did these plaintiffs claim and enjoy this fishery, but scores of others have owned, bought, sold, leased and devised fisheries and water privileges, none of which were ever presented to the Land Commission. It is a settled principle of law that decisions which constitute the foundations to title are not to be lightly disturbed, and this is particularly true where they have stood undisputed for fifty years

Even if the Board of Land Commissioners erred in its decision that its jurisdiction did not extend to claims of piscary rights, and if it were competent, now, to re-open that question and reverse its decision, the omission of

claimants to present their claims before it, under the circumstances, could not bar their rights. The Board, publicly and repeatedly, announced that it would exercise no such jurisdiction, and would entertain no such claims, or pass upon them; and, under such conditions, it would have been a vain and useless thing to present them, and no rights were lost by the failure to make the offer to do so.

U. S. *v.* Lee, 106 U. S., 196, 202.

Neither law nor equity requires meaningless forms.

Case *v.* Beauregard, 101 U. S., 688, 690.

At p. 21 the opposing brief states:

> "The division of the fisheries by such general language, like the division of the lands subsequently by the 'Great Mahele,' did not confer title, but only paved the way to secure title."
>
> Kenoa *v.* Meek, 6 Haw., 671.

This reference is so often repeated in the brief to the same point, that it is rather disappointing to find, upon examination of it, that it has no bearing whatever upon the proposition in support of which is cited.

The opinion in that case contains "a brief history of the legislation on the general subject of land titles,' which states:

> "It appears by the act of the 13th day of June, 1848, that His Majesty, the King, surrendered to his chiefs and people the greater portion of his royal domain, and placed the same in the keeping of the House of Nobles and Representatives, or such

person as they may appoint, and to be disposed of in such manner as the House of Nobles and Representatives may direct.

"Certain lands were confirmed as the private lands of his Majesty Kamehameha III, to have and to hold to himself, his heirs and successors; and certain other lands were set apart as the lands of the Hawaiian Government, subject to the rights of tenants, to be disposed of by the Minister of Interior, according to the provisions of law, with the approval of His Majesty in Privy Council. *The land in controversy, was so set apart to be disposed of as aforesaid.*

"A Board of Land Commissioners was established in 1846 for the investigation and final ascertainment or rejection of all claims of private individuals, whether native or foreign, to any landed property acquired anterior to the passage of this act. The statute declared that this Board shall be in existence for two years.

"On the 13th day of June, 1848, the legislature extended the powers of the Board for such further time as might be necessary for the examination, settlement and award upon all such claims as may have been presented to the said Board."

Then follows a review of several acts extending the time within which claims could be presented and considered, including the Act of 1860, which authorized the Minister of Interior "to grant awards for their lands to all Konohikis who have failed to receive the same from the Land Commission, provided that the names of all such Konohikis appear in the Mahele Book of the year

1848; and all awards so granted by said Minister shall be equally valid with those of the Land Commission."

The action was ejectment, plaintiffs claiming title "by the Mahele of February 4, 1848, and the award issued by the Minister of the Interior in 1862, under the Act of 1860, based upon said Mahele. The defendant claims by a Royal Patent, dated January 27, 1851, to A. Bishop, and a deed from Bishop to himself of May 28, 1851. The ancestor of plaintiffs received from his majesty Kamahameha III the following evidence of title as made by the Mahele. Pahoa's—the one half of the land of the Ahupuaa Kalena Island. One half of the Kalena III of Waianae Ahupuaa, Waianee, Oahu. I consent to this division. It is good; Pahoa's is the one-half of the land mentioned above; consent is given to take it before the Land Commissioners.

"(Signed) KAMAHAMEHA. [Seal.]

"ROYAL PALACE, February 4, 1848."

Pahoa did not exercise the privilege thus given him of taking his claim before the Land Commissioners, but took it before the Minister of the Interior after Bishop had obtained his patent, and then contended that the award of the Minister of the Interior superseded that patent. The Court, in giving judgment against this contention, said:

> "The land was set apart as the land of the Government by a special enactment, subject to the rights of tenants, and, as Pahoa's right was not confirmed by the Land Commission, the entire interest remained in the Government. The Mahele

itself did not give a title. It is a division, and of great value because *if confirmed by the Board of Land Commission, a complete title is obtained.* But it was open to examination, and, if the evidence was satisfactory that the Konohiki was entitled to the land according to the principles which governed that Board of Land Commission, their *award gave a complete title.* By the Mahele, his Majesty the King consented that Paha should have the land, subject to the award of the Land Commission. It appears by the whole course of legislation that an award by the Board of Land Commission was necessary to perfect the title until, by the law of 1860, the Minister of the Interior was authorized to grant awards."

It will thus be seen that the statement of the opposing brief that this case sustains the proposition that the division of fisheries did not confer title is wholly incorrect, and has no application to a case such as the present.

There is no analogy whatever between the "Mahele" or division of land between the King and the landlords, and the statute of 1839 respecting fisheries. The first was in the nature of a partition between tenants in common. The Land Commission decided that if the King should allow the landlords one-third, to the tenants one-third, and retain one-third himself, "he would injure no one unless himself." Principles governing the Land Commission, Revised Laws Hawaii, 1905 p. 1167. The Kingt hereupon agreed to take certain lands, and to give the chiefs certain others, but not only were the chiefs obliged by statute to take their portion before the Land

Commissioners for awards, but the partition, as shown aboved contained an express reference to the necessity of this course, in the words "consent is given to take it before the Land Commissioners." On the other hand, the statute of 1839 respecting fisheries has been decided by this Court to be in the nature of a grant: Not only was there no statute requiring confirmation by the Land Commission, but the Land Commission itself was not created till seven years afterwards. The anology fails completely.

With reference to the inquiry at pages 21–2 of the opposing brief as to how the lines of the fishery are to be run, we submit that this is, at the most, a question of proof, under the authorities cited at p. 12 *et seq.* of our original brief. The offer to prove possession for sixty years of the fishery, under the grant, and as described in plaintiffs' complaint (Record, p. 17), was an offer to "give precision to" the subject-matter of the grant, if any were needed, plainly within the principle of those authorities, and should have been allowed.

The Court below and the opposing brief (p. 20) both refer to an act passed in 1851 (Session Laws, Hawaii, 1851, p. 25), providing, "No person who has bought, or who may hereafter buy, any Government land, or obtain land by lease or other title from any party, has or shall have any greater right than any other person resident in this kingdom, over any fishing ground not included in his title, although adjacent to said land. The fish in said fishing ground shall belong to all persons alike, and may be taken at any time, subject only to the tabu of the

minister of the interior." It does not appear that the Court attached any importance to this act as affecting the rights of the plaintiff in error in this case, and it is very clear that the act is not capable of such a construction; because, in the first place, the fishing grounds of the plaintiff in error and his predecessors in title were "included in his title," for the obvious reason that the decision of the Court in the case of Haalelea *v.* Montgomery, recognizing that title in the landlords, was rendered seven years after this act was passed, and, of course, with full knowledge of it, and for the further reason that the land owned by the plaintiffs in error in this case is not and never was Government land. The fact that persons who bought Government land have, under this statute, no fishing rights connected therewith, is universally recognized in Hawaii; but the rule has no possible application to the case at bar. Moreover, Sec. 2 of this same act of 1851, accompanying and directly following the section in question, quoted by the Court below, provides: "If that species of fish which has been tabooed by any konohiki shall go into the grounds which have been, or may be, given to the people, such fish shall not be tabooed thereon. It shall only be tabooed when caught within the bounds of the konohiki's private fishery"—thus clearly recognizing a vested interest in the konohiki or landlord to such private fishery.

The proposition at page 22 of the opposing brief that the appellants fishing rights can be claimed only as appurtenant to the land granted, because not mentioned in the Land Commissioners' award and the royal patent

based upon it, is only the presentation in another form of the contention above already considered that the omission to present the piscary claim to the Commission is a bar, notwithstanding its decision that it had no jurisdiction of such a claim, and would not consider it if presented; and the proposition, therefore, need not be further discussed. The fishing rights of the predecessor in title of the plaintiff, equally with his rights to the land, existed prior to the creation of the Board of Land Commissioners, and could neither be destroyed or reduced to a mere appurtenance of the land by the refusal of that Board to receive or to exercise jurisdiction over his claim to those rights.

With regard to those portions of the opposing brief dealing with prescription and custom, the appellee seems to misapprehend the purpose for which the proof was offered.

The present plaintiffs in error need only show that A. Paki, their predecessor in title, was in the position of grantee under the grants contained in the statutes. Under the law of 1839, wherein the King "gives * * * another portion to the landlords" (defined as the fishing grounds from the coral reef to the sea beach), it would seem to be necessary only to show that Paki was the landlord, which is undisputed. Under the law of 1846, the fishing grounds "shall, in like manner, be considered private property of the landlord whose lands by ancient regulation belong to the same." Whether this "ancient regulation" was in the nature of appurtenance, prescription, or ancient custom is immaterial; its existence was recognized by statute, and the plaintiffs' offer

of proof to bring them within the statute was rejected by the trial court.

As indicative of the extent to which the opposing brief has gone in repudiating the decision of the questions settled by the Damon case, it concludes by gravely contending that "the statutes of Hawaii relative to fisheries did not and were not intended to operate as grants of any property rights, but were designed, and have always been regarded, as mere general regulations concerning the use of certain public property, to wit: the fisheries,"—and this notwithstanding the following explicit language of this Court in the Damon case: "The foregoing laws not only use the words 'private property,' but show that they mean what they say by the restrictions cutting down what otherwise would be the incidents of private property. There is no color for a suggestion that they created only a revocable license, and, if they imported a grant, or a confirmation of an existing title, of course the repeal of the laws would not repeal the grant. * * * If the Hawaii statutes did not import a grant, it is hard to see their meaning."

Every proposition and argument advanced in the opposing brief on this branch of the case was presented to the Court in the Damon case, and was there given full consideration. It is respectfully submitted that the decision in that case is controlling and conclusive, and that further consideration of the subject is unnecessary.

Respectfully submitted,

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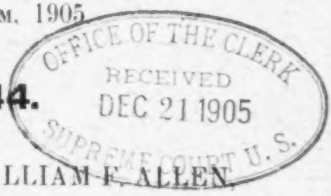
Supreme Court of the United States.

OCTOBER TERM, 1905.



No 144.

JOSEPH O. CARTER, WILLIAM F. ALLEN, WILLIAM O. SMITH, SAMUEL M. DAMON And ALFRED W. CARTER, Trustees under the will of Bernice Pauahi Bishop, deceased,

PLAINTIFFS IN ERROR,

vs.

TERRITORY OF HAWAII,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT IN ERROR.

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FOR DEFFENDANT IN ERROR.

PRESS OF THE HAWAIIAN GAZETTE CO., LTD., HONOLULU

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Supreme Court of the United States

OCTOBER TERM, 1905.

Number 144.

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Plaintiffs in Error,

vs.

TERRITORY OF HAWAII,

Defendant in Error.

In Error to the Supreme Court of the Territory of Hawaii:

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

On May 1st, 1902, the plaintiffs in error commenced an action in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, claiming to be the sole and exclusive owners in fee simple of a certain sea fishery situated within the

reef in Waialaeiki, Island of Oahu, Territory of Hawaii, bounded and described as follows:

"Beginning at a point on the sea shore at a yellow colored stone at the end of the Wailupe fish wall, said point being on the boundary of Waialaeiki and Wailupe, and running 35° 00′ E. magnetic to the outer line of breakers on the reef in Waialae Bay, thence running along said outer line of breakers to a point which is S. 60° E. magnetic from the boundary of Waialaeiki and Waialaenui; thence

"North 60° 00′ W. to said boundary at the seashore at high water line at the mouth of the Kapakahi Stream, and thence along the shore line of Waialaeiki at high water line to the initial point, the direct bearing and distance being N. 50° 00′ E., 6500 feet more or less."

Transcript of Record, p. 10.

The particular fishery claimed by the plaintiffs in error consisted of the right each year to set aside for themselves, for their sole and exclusive use within the fishing grounds within the metes and bounds above set out, one given species or variety of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart; and also the right in lieu of setting apart some particular fish to their exclusive use to prohibit upon consultation with the tenants of their lands all fishing upon the fishing grounds within the metes and bounds above

set forth during certain months of the year, and during the fishing season to exact from each fisherman one-third of all the fish taken upon said fishing ground.

Transcript of Record, p. 11.

This claim of right was alleged to be based upon two grounds:

First, that from time immemorial the plaintiffs in error and their grantors, by ancient custom and prescription, have had an exclusive fishery within the bounds above set out, subject only to the rights of tenants on the land of Waialaeiki.

Second, that said fishery was originally appurtenant to the land of Waialaeiki awarded to A. Paki by Apana 3 of Land Commission Award No. 10,613 and confirmed by Royal Patent No. 3578.

Transcript of Record, p. 11.

After the filing of an answer by the Territory of Hawaii denying generally all of the allegations of the complaint except those relating to the interest claimed by the Territory, a hearing was had, and subsequently, on July 17th, 1902, a bill of exceptions and agreed case was filed showing the following facts:

(1) That the plaintiffs in error had the legal title to the land at Waialaeiki to which it was contended the fishing right claimed by them was appurtenant.

(2) That on April 8th, 1857, Royal Patent No. 3578 was issued by King Kamehameha III. grant-

ing to one A. Paki, 1391 acres of land, more or less, situated at Waialaeiki, Ili of Waikiki, Island of Oahu, such land being described in the patent by metes and bounds, and being the same land to which the plaintiffs in error claimed the fishery in question to be appurtenant.

(3) That the fishery right claimed by the plaintiffs in error was not mentioned or referred to in any manner in said Royal Patent No. 3578.

(4) That Royal Patent No. 3578 was based upon a Land Commission Award made on the 19th day of March, 1853, by the Board of Commissioners to Quiet Land Titles, and that this award contained no reference to any fishery claim or right.

(5) That the plaintiffs in error claimed to have acquired a vested right in the fishery referred to in the complaint by virtue of the laws of the kingdom of Hawaii and by virtue of the common law of Hawaii and of ancient custom in Hawaii, and that plaintiffs in error offered to prove in support of this claim that for a period of sixty years they, and those under whom they claimed title, had been in possession of the sea fishery of Waiakaeiki described in the complaint, claiming title to the same; that said possession so far as the Konohiki or landlord's) right was concerned had been continuous, exclusive and notorious for said period and under a claim of right; and that the rights claimed to said fishery consisted of the

right each year to set apart for themselves, for their sole and exclusive use, within the fishing grounds according to the metes and bounds set out in the complaint, one given species or variety of fish natural to said fishery, giving public notice of the kind and description of the fish so chosen or set apart, and also the right in lieu of setting apart some particular fish for their exclusive use, to prohibit, upon consultation with the tenants of their lands, all fishing within the fishing grounds within the metes and bounds set forth during certain months of the year, and during the fishing season to exact from each fisherman one-third of all the fish taken from said fishing grounds.

(6) That the plaintiffs in error offered to prove that from time immemorial by Hawaiian custom and by the common law of Hawaii, prior to the passage of the Act of June 7th, 1839, relating to fisheries, a similar right to the sea fishery at Waialaeiki had been held and enjoyed by those under whom the plaintiffs in error claimed title, as appurtenant to the land of Waialaeiki.

(7) That the plaintiffs in error offered to prove that prior to the enactment of June 7th, 1839, relating to fisheries, that rights similar to those set out in said statute from time immemorial had been enjoyed by those under whom the plaintiffs in error claimed title to the land of Waialaeiki, as appurtenant to said land and that said rights

had been openly, continuously and notoriously asserted and exercised under claim of title, to the exclusion of all other persons.

(8) That the presiding judge at the hearing rejected all of the proffered testimony as above set out, and ruled that no vested rights could be acquired in sea fisheries in Hawaii by virtue of any occupation or custom of the country or any statute of Hawaii respecting fisheries, and that upon the repeal of the laws of Hawaii respecting fisheries by the Organic Act the fishery right claimed became terminated, and accordingly ordered judgment entered in favor of the Territory of Hawaii; to all of which rulings the plaintiffs in error duly excepted.

At the October 1902 term, the Supreme Court of the Territory of Hawaii heard the exceptions in this case in conjunction with exceptions in the case of Samuel M. Damon vs. The Territory of Hawaii. There is an important and substantial difference between the cases, however.

In the Damon case the claim for a fishery was based principally upon a clause in the Royal Patent which recited that there was attached to the land a fishing right in the adjoining sea, and the metes and bounds of this fishing right were set out in the patent itself.

Transcript of Record, p. 29.

This court, when the matter was before it in the Damon case at the October 1903 term, (194

U. S. 154), held that a definite "fishing right in the adjoining sea" described in the granting clause of a Royal Patent as "attached to the land" is included in the grant, although the habendum is to have and to hold "the above granted land," which, standing alone, might not include a fishing right.

In the case at bar as we, have shown, neither the Land Commission Award nor the Royal Patent contain any reference to a fishing right.

The exceptions in this case, as well as in the Damon case, were decided by the Supreme Court of Hawaii on November 15, 1902, and it was then held that the Hawaiian statutes giving konohikis (or land lords) special privileges in the sea fisheries adjoining their land, were not grants of property or covenants in the nature of grants but were public statutes in which no one could acquire a vested right; that the phrase "private property" used in the statutes denoted no more than the special rights or privileges given by law over the sea fishery; that when the statutes were repealed by the Organic Act of the Territory the konohiki or land lord no longer had any private property in such fishery; that exclusive rights in sea fisheries surrounding the Hawaiian Islands could not be acquired by prescription or ancient custom; and that the konohiki's or land lord's "private property" in the sea fishery could not pass as an appurtenance to the land.

Transcript of Record, pp. 19, 20.

The exceptions in this case were consequently disallowed by the Supreme Court of the Territory and the judgment of the Circuit Court confirmed, whereupon a writ of error was brought to this Court.

BRIEF OF THE ARGUMENT.

I.

SHORT HISTORY OF LAND TITLES IN THE HAWAIIAN ISLANDS.

Until the year 1839, a state of affairs very much resembling the feudal system of Europe during the middle ages existed in the Hawaiian Islands.

Previous to the conquest by Kamehameha the First of the whole islands, each island had a king or high chief, and the districts or sub-divisions within them were governed by a chief owing fealty to the high chief, and to whom the rest of the sub and petty chiefs of the particular island owed allegiance, and from whom such sub or petty chiefs received their lands.

When the islands were conquered by Kamehameha the First he followed the example of his predecessors and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants.

Each principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were sub-divided again and again, often passing through the hands of four, five or six persons from the king down to the lowest class of tenants. All these persons were considered to have rights in the

lands or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged.

All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owed and paid to the king, not only a land tax which he assessed at pleasure, but also service which was called for at discretion, on all the grades from the highest down. They also owed and paid some portion of the productions of the land in addition to the yearly taxes.

A failure to render any of these was always considered a just cause for which to forfeit the lands. The same rights which the king possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land, the king really owning the allodium, and the person in whose hands he placed the land holding it in trust, and at the will of the king.

In the year 1839 began that peaceful but complete revolution in the entire polity of the kingdom which was finally consummated by the adoption of the Constitution of 1852. King Kamehameha III began by declaring protection for the persons and private rights of all his people from the highest to the lowest. In 1840 he granted the first Constitution by which he declared and established the equality before the law of all his subjects, chiefs and people alike. By that constitution he voluntarily divested himself of some of his

powers and attributes as an absolute ruler and conferred certain political rights upon his subjects, admitting them to a share with himself in legislation and government. This was the beginning of a government as contradistinguished from the person of the king, who was thenceforth to be regarded rather as the executive chief and political head of the nation than its absolute governor. But the political changes introduced at that period did not affect in the least the King's rights as a great feudal chief or suzerain of the kingdom. He had not as yet yielded any of those rights. An illustration of the arbitrary power of the king at about this time is found in Chapter 3 of the Laws of 1839, promulgated by Kamehameha III, which is as follows:

"His Majesty the King hereby takes the fishing "grounds from those who now possess them, from "Hawaii to Kauai, and gives one portion to the "common people, another portion to the landlords, "and a portion he reserves to himself. These are "the fishing grounds which His Majesty the King, "takes and gives to the people. The fishing grounds "without the coral reef, namely: the Kilohee "grounds, the Lohee grounds, the Malolo grounds, "together with the ocean beyond. But the fishing "grounds from the coral reef to the seabeach are "for the landlords and for the tenants of their sev-"eral lands, but not for the others."

Whatever vested rights in property, including

fisheries, are claimed at the present time, must of necessity have had their foundation subsequent to the year 1839. Prior to that time the king was the absolute owner of all property within the kingdom, and no vested rights could be acquired by any of his subjects.

It being obvious that the internal resources of the country could not be developed while the system of undivided and undefined ownership in land continued, a law was enacted in 1846 providing for the establishment of a Board of Land Commissioners for the purpose of effecting a division of rights in land and of quieting titles throughout the kingdom.

Laws of Hawaii, 1846.

In order to obviate the difficulties standing in the way of a consummation of the purposes for which the commission was created, it was resolved by the king in council to effect, through the assistance of a committee, a division of lands between the king as suzerain and the high chiefs and konohikis (or overlords) as feudatories. This division was soon effected and on June 7th, 1848, a law was passed entitled "An Act Relating to the Lands of His Majesty the King and of the Government," which provided as follows:

"Whereas, it hath pleased his Most Gracious "Majesty, Kamehameha III, the King, after reserv "in certain lands to himself as his own private "property, to surrender and forever make over

"unto his chiefs and people the greater portion of "his royal domain;

"And Whereas, it hath pleased our Sovereign "Lord, The King, to place the land so made over "to his chiefs and people in the keeping of the "House of Nobles and Representatives or such per- "son or persons as they may from time to time "appoint to be disposed of in such manner as the "House of Nobles and Representatives may direct "and as may best promote the prosperty of this "kingdom and the dignity of the Hawaiian Crown;

"Therefore be it Enacted by the House of "Nobles and Representatives of the Hawaiian Is- "lands in Legislative Council assembled:

"That expressing our deepest thanks to His "Majesty for this noble and truly royal gift, we do "hereby solemnly confirm this great act of our "Good King and declare the following named "lands, namely:

"Name of Lands	Ahupuaa	Districts	Islands
"Puuwaawaa	Ahupuaa	Kona	Hawaii
"Haleohiu	"	"	"
"Puaa	"	"	"
" Etc.	Etc.	Etc.	Etc.

"to be the private lands of His Majesty, Kame- "hameha III, to have and to hold to himself, his "heirs and successors forever; and said lands shall "be regulated and disposed of according to his "Royal Will and pleasure, subject only to the "rights of tenants.

"That we do hereby in the names of the Chiefs "and people of the Hawaiian Islands, accept of "the following lands, viz:

"Names of Lands.	Ahupuaa	Districts	Islands
"Puuanahula	Ahupuaa	Kona	Hawaii
"Kukio I	"	"	"
"Kukio II	"	"	"
" Etc.	Etc.	Etc.	Etc."

Civil Code, 1859, p. 374.

This division of the lands of the kingdom, commonly known as the "Great Mahele," bears a great similarity to the division of the fisheries made in 1839. but it has been continually held, as we shall show, that the mahele passed no title to the lands enumerated in any person unless ratified by the Board of Land Commissioners.

A very interesting historical account of the origin of land titles in the Hawaiian Islands will be found in the cases of

In re Estate of Kamehameha IV, 2 Haw. 715,

Thurston vs. Bishop, 7 Haw. 421.

and in the "Principles Adopted by the Board of Land Commissioners to Quiet Title in Their Adjudication of Claims Presented to Them."

Laws of Hawaii, 1847.

Revised Laws of Hawaii, p. 1164.

II.

THE FISHERY RIGHT CLAIMED BY PLAINTIFFS IN ERROR (IF ANY EVER EXISTED) WAS LOST BECAUSE NOT PRESENTED TO THE LAND COMMISSIONERS FOR AWARD.

Section 8 of the act creating the Board of Land Commissioners (Laws of Hawaii, 1846) provides that:

"All claims to land, as against the Hawaiian "Government, which are not presented to said "Board within the time, at the place and in the "manner prescribed in the notice required to be "given in the fifth section of this article, shall be "deemed to be invalid, and shall be forever barred "in law, unless the claimant be absent from this "kingdom and have no representative therein."

Section 13 of the act provides that:

"The titles of all lands claimed of the Hawaiian "Government anterior to the passage of this act, "upon being confirmed as aforesaid, in whole or "in part, by the Board of Commissioners, shall be "deemed to be forever settled as awarded by said "Board, unless appeal be taken to the Supreme "Court, as already provided. And all claims re-"jected by said Board, unless appeal be taken as "aforesaid, shall be deemed to be forever barred "and foreclosed, from the expiration of the time al-"lowed for such appeal."

These provisions of the act creating the Board of Land Commissioners constitute a general statue of limitations, and it was so held in the case of

Thurston vs. Bishop, 7 Haw. 421, 423.

A. Paki, the predecessor in interest of the plaintiffs in error, made no claim before the Land Commission for any fishing right. The Land Commission award made on the 19th day of March, 1853, contains the following language:

"He made claim for his land of Waialaeiki, "being a Ili of Waikiki, Kona, on the Island of "Oahu, because he came into possession of this "land from Kamehameha III at the time of the "division of land in the A. D. 1848, and has peace-"ably held it to the present time without inter-"ruption. Thus we award to A. Paki that he has "title less than allodial. In case he should pay "the Government's share, then he is entitled to a "royal patent in fee simple."

Transcript of Record, p. 38.

Royal Patent No. 3578 to A. Paki based upon the award of the Commissioners describes by metes and bounds the land at Waialaeiki claimed by A. Paki, but contains no reference whatever either by metes and bounds or otherwise to any fishing rights or fishing grounds adjoining the land granted.

Transcript of Record, p. 33.

That the Board of Land Commissioners was given express authority to award fishing rights is clearly apparent from the statute which created the Board, Section 7 of which provides as follows:

"The decisions of said Board shall be in accord-
"ance with the principles established by the Civil
"Code of this kingdom in regard to prescription,
"occupancy, fixtures, native usages in regard to
"landed tenures, *water privileges and rights of*
"*piscary*, the rights of women, the rights of ab-
"sentees, tenancy and sub-tenancy—primogeni-
"ture and rights of adoption; which decisions
"being in majority of a number of said Board shall
"be only subject to appeal to the Supreme Court,
"as prescribed in the act to organize the judiciary,
"and when such appeal shall not have been taken,
"they shall be final."

It has been the law of the Hawaiian Islands since the time of the establishment of the Land Commission that any person who had a claim cognizable by the Board and failed to present the same and obtain an award thereon, lost his claim.

"The Land Commission was a court and had
"full jurisdiction to settle all claims to land,
"whether by claimants of the larger divisions of
"land as divided in ancient time by name or by
"the natives living on the land under the chiefs.

"If the Land Commission expired and the native
"tenants neglected to present their claims for the
"parcels of land which they desired, and for which

"they would ordinarily be awarded a kuleana "title, showing merely their occupation of the "same as a foundation for it, we think they must "be considered as content with their prior status "as tenants by permission of the landowner. Such "tenancy would, therefore, in law be considered as "continuing until some act of theirs changed their "holding from the permissive nature to one of "adverse or hostile nature."

Dowsett vs. Maukeala, 10 Haw. 169.

"No claim to the land called Opu had been pre-"sented to the Commissioners to quiet land titles "within the time limited by statute for filing such "claims and the land had not been awarded by "the Commission to any one nor had a royal patent "been issued to any one for it. Held, that by "the force and effect of the statute creating the "Land Commission, the claim which defendant's "predecessor had to this land was barred in law "by non-presentation to the Commission and they "had no title to it. The land not being held by the "defendant by some title proceeding from the gov-"ernment, it is still the property of the govern-"ment."

Thurston vs. Bishop, 7 Haw. 421.

"The construction put upon the statute that a "failure to present a claim within the prescribed "time absolutely barred the claimant by the legis-"lative power of the kingdom, the King and the "Nobles and the Representatives, and uniformly

"concurred in and acted upon by successive gov-"ernments under many reigns following, and to "this day undisturbed by any judicial decisions, "we are not at liberty to disregard."

Thurston vs. Bishop ,7 Haw. 432.

"The Mahele itself does not give a title. It is "a division and of great value, because if confirmed "by the Board of Land Commissioners, a complete "title is obtained, but it was open to examination "and if the evidence was satisfactory that the "konohoki was entitled to the land according to "the principles which governed the Board of Land "Commissioners, their award gave a complete "title. By the Mahele, his Majesty, the King, "consented that Pahoa should have the land sub-"ject to the award of the Land Commission. It "appears by the whole course of legislation that "an award of the Board of Land Commissioners "was necessary to perfect the title until by the "laws of 1860 the Minister of the Interior was "authorized to grant awards."

Kenoa vs. Meek, 6 Haw. 67.

See also,

Kaai vs. Mahuka, 5 Haw. 356.

Kahoomana vs. Minister, 3 Haw. 639.

The requirement that all claims to lands and fisheries within the Hawaiian Islands had first to be presented to and passed upon by the Board of Land Commissioners in order to vest title is simi-

lar to a requirement contained in the Act of Congress of March 3rd, 1851, establishing a special tribunal for determining all claims to lands in the state of California based upon grants derived from the Spanish or Mexican government. In construing this act the court held in Brigido Botiller, et al., vs. Dominga Dominguez (130 U. S. 238) that no title to land in California dependent upon Spanish or Mexican grants, could be of any validity, which had not been submitted to and confirmed by the Board provided for that purpose, or, if rejected by that Board, confirmed by the District or Supreme Court of the United States.

The Civil Code of 1859 contains the following provision:

"SECTION 393. No person who has bought or "may hereafter buy any government land or ob- "tain lease or other title from any party has, or "shall have any greater right than any other per- "son resident in this Kingdom over any fishing "ground not included in his title, although adja- "cent to said land."

This provision was enacted in 1851, the same year that A. Paki secured his patent to the land at Waialaeiki, and at a time when the only title recognized was that based upon a Land Commission award, and it was evidently the intention of the legislature that if a fishing right was not specifically referred to in the title or patent, it should have no validity. This view is consistent

with the policy of the government, which seems, since the year 1839, to have been to enlarge to the fullest extent the rights of the public to the sea fisheries of the kingdom.

The claim of the plaintiffs in error to a statutory grant is based upon the indefinite language used by Kamehameha III in the Constitution of 1839 set out above, and upon subsequent re-enactments of those provisions.

The division of the fisheries by such general language like the division of the lands subsequently by the "Great Mahele" did not confer title, but only paved the way to secure title.

Kenoa vs. Meek, 6 Haw. 67.

Aside, too, from the fact that the predecessor in interest of the plaintiffs in error failed to perfect his title to the fishery (if any ever existed) before the Board of Land Commissioners, we can not see how the statutory enactments relating to fisheries can be construed as a grant or as creating any contractual relation. No specific description or bounds are given, no grantee is named nor is the nature of the estate claimed to have been granted specified. There is nothing to indicate any boundary between adjoining fisheries. A common shape of an Ahupuaa is that of a wedge sometimes with the apex at the beach, but more often the opposite. In any such case, in what direction would the seaward lines demarking the fisheries run? Would they run at right angles to

the beach or would they be extended to the reef upon the same course that the boundaries follow on the land? In the case at bar, how can the court say that under the general terms of the constitution of 1839 and subsequent re-enactments, the boundary of the alleged fishery claimed by the plaintiffs in error runs in a direction on the one side of South 35° East and on the other of North 60° West as alleged in the complaint? No such general language as the Constitution and statutes contain, no such uncertainty as to grantees, the subject matter of the grant and the nature of the estate, can be considered as intended for a grant in praesenti, an executed contract conferring a vested right.

One of the main objects for which the Board of Land Commissioners was created was to ascertain boundaries and quiet titles, which theretofore were vague and uncertain because of such defects as existed by reason of the loose and general language contained in the attempted divisions of the lands and fisheries made by Kamehameha III.

III.

THE FISHERY CLAIMED CAN NOT BE HELD TO BE APPURTENANT TO THE LAND GRANTED TO THE PREDECESSOR IN INTEREST OF THE PLAINTIFFS IN ERROR.

Neither the Land Commission Award nor the Royal Patent to A. Paki make mention of any fish-

ing right; so the plaintiff in error is forced into the position of claiming such a right as appurtenant to the land of Waialaeiki. It may be taken for granted that the court will agree with the statement that the right to fish in the tidewaters is a public right, and that under the English and American decisions and the common law of England, property in the sea belongs to no man, and that to give a person or persons monopolistic rights to control waters of the ocean, whether for fishing or other purposes, is against the teachings of American and English jurisprudence.

"The right to fish in the tide waters is a public "right."

13 Am. and Eng. Enc. of Law, p. 560, et seq.)

"By the common law, both the title and domin-"ion of the sea and of rivers and arms of the sea, "where the tide ebbs and flows, and of all the land "below high water mark, within the jurisdiction "of the Crown of England are in the King. Such "waters and the land which they cover, either at "all times or at least when the tide is in, are in-"capable of ordinary and private occupation, "cultivation and improvement, and their natural "and primal uses are public in their nature for "highways of navigation and commerce, domestic "and foreign, and for the purpose of fishing by all "the King's subjects. * * * * The common "law of England upon this subject at the time of

"the immigration of our ancestors is the law of "this country, except so far as it has been modi- "fied by the charters, constitutions, statutes or "usages of the several colonies and states or by the "constitution and laws of the United States."

Shively vs. Bowlby, 152 U. S., 1.

"Whatever soil below low water mark is the "subject of exclusive propriety and ownership, be- "longs to the state whose maritime border and "within whose territory it lies, subject to any law- "ful grants of that soil by the state or the sover- "eign power which governed its territory before "the Declaration of Independence, and this soil "is held by the state not only subject to, but, in "some sense, in trust for the enjoyment of certain "public rights, among which is the common lib- "erty of taking fish, as well shellfish as floating "fish."

Smith vs. Maryland, 18 How. 71.

"The right to navigate the public waters of the "state and to fish therein, and the right to use the "public highways are all public rights belonging "to the people at large. They are not private, "inalienable rights of each individual."

Lansing vs. Smith, 4 Wend. 9.

See also

Wooley vs. Campbell, 37 N. J. Law, 163.

Weston vs. Sampson, 8 Cush. 347.

"If the defendant has any title to the land under "the waters of that portion of Lake Huron known "as Thunder Bay, he must have derived it either "by grant from the United States or from the State "of Michigan. He claims it by grant from the "United States and by virtue of his riparian pro- "prietorship in Sulphur Island, and that as a con- "comitant of this interest in the soil he has the "exclusive right of fishery in the waters of the bay "in front of the island, at least so far as the driv- "ing of stakes in the soil and the use of trap nets "is concerned. What, then, are the boundaries "made by the United States Government of the "land on Sulphur Island? I have no hesitation in "saying that they are limited by low water mark. "* * * * There is nothing in the previous de- "cisions of this state which determines the defend- "ant's exclusive right of fishing at the points "stated in the declaration. I think that the "waters of Thunder Bay are public waters and the "right of fishing therein is a common right of all "citizens of this state, subject to the paramount "right of navigation, and is the subject of legisla- "tive control."

Lincoln vs. Davis, 53 Mich. 375.

The clear result of the foregoing citations is that at common law the right to fish in tide waters is a public right; that the riparian proprietors have no greater right to fish in the waters adjoining their land than that possessed by every citizen, and that

there can be no exclusive right in such waters as an appurtenance to the lands bordering thereon. This doctrine is so well settled that there is nothing strange or straiting in the fact that it was adopted and carried out in the old Hawaiian decisions which have never been reversed.

In the case of Haalelea vs. Montgomery, 2 Haw. 70, the leading decision on ancient fishing rights, when special privileges were held by the landlords under the Hawaiian statutes, the Court held that the landlord's fishing rights were not an appurtenance to his ownership of the land, and could not be transferred by the landlord with his land as an appurtenance. The court says on page 70 of the decision:

"None of the rights of piscary possessed by M. "Kekanonohi as owner of the fishery could have "passed as a mere appurtenance to the piece of "land conveyed to Isaac Montgomery. She could "have transferred the fishery or her right therein "only by an express grant *co nomine*. Had she "made a deed even of the whole Ahupuaa by metes "and bounds not including the fishery nor express-"ly naming it in the conveyance, it is doubtful if "either the fishery or her rights therein would "have passed to the grantee."

The doctrines laid down in Haalelea vs. Montgomery should not now be shaken. They have stood as the undisputed law of the Hawaiian Islands since 1858. There is nothing

inconsistent in those doctrines with either natural law, the common law of England or the laws of the United States. That case established a rule of property upon which the people of these islands have relied for nearly half a century and that rule should not at this late day be disturbed.

IV.

A FISHING RIGHT CAN NOT BE ACQUIRED BY PRESCRIPTION.

A further contention of the plaintiffs in error is that they have acquired the fishing right in question by prescription; but to hold that prescriptive rights to fish may be acquired in tide waters would be to ignore the principle that exclusive fishing rights can be acquired only from the legislature, and to upset the rule that time does not run against the state.

"There is no prescription against the state. "6 Peters, 666. The Supreme Court of the United "States say in this case: " 'It is a well-settled "principle that the Statute of Limitations does not "run against the state. If a contrary rule were "sanctioned, it would only be necessary for in- "truders upon the public lands to maintain their "possession until the Statute of Limitations shall "run; and then they have become invested with "title against the government and all persons "claiming under it. In this way the public do- "main would soon be appropriated by adventur-

"ers. Indeed, it would be utterly impracticable "by the use of any power within the reach of the "government, to prevent this result. It is only "necessary, therefore, to state the case in order to "show the wisdom and propriety of the rule that "the statute never operates against the govern-ment."

Thurston vs. Bishop, 7 Haw. 437.

"The theory of titles by prescription is, that the "holding possession of an estate openly and ad-"versely for a certain length of time creates an "inference that there was a grant from the ad-"verse claimant or his ancestors or grantors, and "the Statute of Limitations forbids the adverse "claimant from setting up against this long-con-"tinued possession, the fact that there was no "grant. But as against the government, a grant "can not be presumed or inferred from long pos-"session in view of the law which required claim-"ants to land to present their claims to the Land "Commission for confirmation or rejection."

Kahoomana vs. Minister, 3 Haw. 640.

Prescription pre-supposes a grant vesting an interest. As we have shown, no person could acquire a vested interest in property prior to 1839, and any grant subsequent to that time would have to be confirmed by the Land Commissioners in order to make it valid. As stated in Fishing Company vs. Carter, 61 Penn. St., 21:

"Independently of the acts of Assembly, there "is no exclusive right of fishing by the riparian "proprietor opposite to his shore in any navigable "river. * * * * In England there are such "several and exclusive fisheries in navigable rivers "attached to manors, either by early grant from "the crown or by prescription, because there "might have been such a grant upon which to "found it. In this state there can be no such pre- "scription. Prescription rests upon a presump- "tion of a grant which has been lost by process of "time. No prescription, therefore, can have a "legal origin where no grant could have been made "to support it."

Whatever dicta there may be in other jurisdictions relative to the acquisition of fishing rights by prescription, we submit that such method of acquiring title in these islands has never been recognized. In the "Principles Adopted by the Board of Land Commissioners (Laws of Hawaii, 1847), will be found the following:

"* * * * The King representing the Gov- "ernment, having formerly been the sole owner of "all the soil, he must be considered to be so still "(August 20th, 1846) unless proof be rendered to "the contrary; and even *possession of ever so long "standing* can not be proof of anything more than "that which is specified above as belonging to the

"landlord or to the landlord and tenant, as the "case may be."

These principles of the Land Commission have been expressly recognized as part of the law of the land.

Kahoomana vs. Minister, 3 Haw. 639.

There is absolutely no merit in the prescriptive claim.

V.

A FISHING RIGHT CAN NOT BE ACQUIRED BY CUSTOM.

All that has been urged relative to the claim of title by prescription applies to the claim set up by the plaintiffs in error of "title by custom."

No custom antedating the act of 1839 could have any force or value. At that time the title to all the fisheries was in the King. The only law and the only lawful custom was the will of the King. The King's title passed to the government and became the subject of the legislative will as expressed in public enactments. The futility of inquiring into the ancient custom since the passage of the statute was recognized by the court in Hawaii.

Haalelea vs. Montgomery, 2 Haw. 70.

It can not be disputed that in 1839 the title to all the fisheries, as well as the land, was vested in

the King. It is true that the Land Commission recognized certain rights in the Chiefs and the People, but those rights were moral rather than legal and they only became legal rights upon the issuance of an award.

And as has been seen any claims that were not awarded lapsed and the title remained in the government or the awardee of a larger land within which the claim might have been asserted as the case might be.

It is probable that the King had previously allotted fisheries to his chiefs as it was his custom to do in regard to the lands, but such allottments merely created tenancies at the will of the King.

The Declaration of the King in 1839 that he resumed possession of the fisheries for the purpose of redistributing them goes to prove his absolute ownership and control of them, and indicates also that the act was not merely declaratory of pre-existing custom, but that it changed the allottment which had been in vogue theretofore.

"His Majesty, the King, hereby takes the fishing grounds from those who now possess them from Hawaii to Kauai, and gives one portion to the common people, another portion to the landlords and a portion he reserves to himself," and further:

"These are the fishing grounds which His Majesty, the King, takes and gives to the people."

This language is not such language as would be

declaratory of pre-existing rights and custom. It is the language of an absolute power. He "takes" from one party who has held it heretofore and "gives" to another party according to his will. It is a distinct change in the allotment which had been in vogue theretofore.

VI.

THE STATUTES RELATING TO FISHERIES DID NOT CREATE VESTED RIGHTS.

Notwithstanding what the court said in the case of Damon vs. Territory of Hawaii, 196 U. S. 154, we respectfully but earnestly contend that the Statutes of Hawaii relative to fisheries did not and were not intended to operate as grants of any property rights, but were designed and have always been regarded as mere general regulations concerning the use of certain public property, to-wit: the fisheries.

It is admitted that the "Konohiki's" or landlord's right of fishery was a property right as long as the Statute remained in force, but it is denied that it was a vested right in the sense that it could not be changed or defeated by act of the legislative authority, either by way of an amendment, making a new distribution of the fisheries, or by a repeal putting an end to all exclusive rights, and in this sense we use the word "property" and believe it is used in the various Statutes in the general sense,

meaning dominion over a thing, and that the words "private property" in these Statutes cannot mean more than the rights which the Statute gave to the Konohikis or landlords over the fishery, and such private property could not be said to be held by contract or by any covenant in the nature of a contract.

A mere expectation based upon an anticipated continuance of general laws cannot be claimed to be a vested right. In order to be a vested right there must be an actual title to some property.

Not only is the right of fisheries in tide waters a public right, but "laws for the regulation of fishing are public Statutes of which the Court takes judicial notice."

Gould on Waters, Sec. 189.

That the Statute in question prescribes the "piscatory regulations" of Hawaii.

See Haalelea vs. Montgomery, 2 Haw., 65.

It is well settled that there can be no vested right under a public statute relating to a public subject that does not amount to a grant or contract.

"The Dartmouth College case was the pioneer in this field of our jurisprudence. The principle there laid down, since maintained in the cases which have followed and been controlled by it, has no application where the Statute in question is a public law relating to a public subject within the

domain of the general legislative power of the State and involving the public, rights and public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation."

Newon vs. Commissioners, 100 U. S., 587.

"It is generally agreed, however, that there can be no such thing as a vested right in a public law, which is not in the nature of a grant, hence, however beneficial an act of the legislature may happen to be to a particular person, or however injurious its repeal may affect him, the legislature would clearly have the right to abrogate it. Indeed, the legislature has the undoubted right to repeal all legislative acts which are not in the nature of contracts or private grants.

Dobbins vs. Bank, 112 Ill., 562.

In Maryland a Statute authorized any citizen of any county bordering on the waters of the State to locate and appropriate within the waters therof any area not exceeding one acre, for the purpose of depositing and bedding oysters. Under this act it was held that "It abundantly appears from the nature of the privilege in dispute, as well as from the terms in which it was conferred that no transfer of the States's title to lands covered by navigable water was contemplated. Permission to use

given areas covered by navigable water for a particular purpose seems to be all that the legislature intended, and we think the language of its assent to that use should be construed, not as a grant binding the State but as a conditional license, revocable at the pleasure of the legislature."

Phipps vs. State, 85 Am. Dec., 654.

In Pratt vs. Brown, 3 Wis., 603, it was held that the right given by statute to mill owners to build dams and flood their neighbors' lands was not a vested right, but one which terminated with the repeal of the act. We submit that that case is directly in point here. The case has been attempted to be distinguished on the ground that the mill dam act under which the dam was built was void because of its taking private property for private purposes. The point is not well taken. The decision in that case shows that the constitutionality of the act had been previously sustained. The flooding of lands for mill purposes is generally considered a public purpose. See Commissioners vs. Water Power Co., 104 Mass., 446.

"A privilege to a private person to use a public right for his private gain will not be deemed exclusive unless the intent of the legislature is perfectly clear. All these great rights are held in trust for the general good, and the representatives

of the people must be deemed not guilty of a breach of this trust, or a dereliction of duty. Hence nothing less than a plain contract between the State and the individual for an adequate consideration can bind the hands of the State and prevent the repeal of a mere privilege."

Johnson vs. Crow, 87 Pa. St., 189.

Regarding the declaration of the King of 1839 as a "mahele," the mere declaration or division cannot be construed as conferring any title.

The Great Mahele of the lands did not confer title but only paved the way to get title.

Kenoa vs. Meek, 6 Haw., 63.

By parity of reasoning the King's declaration as to the fisheries, less formal and definite than the mahele of the lands as it was, did not give any title, but at best, merely paved the way to get title through the Board of Land Commissioners.

The fact that the konohikis owned no lands in 1839 tends to prove that the statutory declaration and enactment was not intended to be a grant in praesenti. And the further fact that but few fisheries were awarded by the Land Commission goes to show that but few persons were able to prove their claims according to the rules and principles which governed the Commission.

We find that a somewhat similar principle is

recognized in the United States land system. Thus it has been held that the swamp land act of 1850 "made a grant in praesenti, in other words, the title then passed to all lands which at that date were swamp lands; and the only matters thereafter to be considered were those of identification. But while the act operated as a grant in praesenti, the determination of what lands were swamp lands was intrusted to the Secretary of the Interior. * * * * It will be perceived that the act contemplated the issue of a patent as a means of transferring the legal title. * * * * When he (the Secretary of the Interior) made such identification, then, and not before, the State was entitled to a patent, and on such patent the fee simple title vested in the State. The State's title was at the outset an inchoate one and did not become perfect, as the date of the act, until a patent was issued."

Lumber Co. vs. Rust, 168 U. S., 589.

Under such a statute the failure of the Secretary of the Interior to identify any land or particular tract of land as swamp would be the equivalent of the failure or refusal of the Land Commission to award a fishery. The title would not pass to the claimant. He would acquire no vested right.

While it is conceded that private exclusive rights in the public waters may be obtained by

individuals, it is earnestly contended that they can only be obtained by clear and unequivocal grant under legislative authority. And while the necessity and duty of the courts to protect vested rights is freely admitted, it is submitted that the burden is on the party claiming such a right to prove that he has it.

It seems very clear that the general konohiki right was only a statutory privilege which was terminated by the Act of Congress which opened the sea fisheries to the public and saved only vested rights. The saving clause will not be rendered valueless by so holding, because some fisheries were actually awarded by the Land Commission, and the owners of such fisheries are protected in their property by that saving clause.

This Court in the case of Damon vs. Territory of Hawaii, 194 U. S., 154, did not go into the question of prescription or custom because the fishing right there claimed became "vested" upon the issuance of the Royal Patent, the patent itself specifically granting a fishing right and particularly defining its boundaries. The Court assumed in that case (page 161) that a mere grant of the ahupuaa (or tract of land) without mention of the fishery would *not* convey the fishery. That is our contention in the case at bar, and Section 95 of the Organic Act of the Territory, which in the

first section repeals all laws conferring exclusive fishing rights, and in the second portion declares that all fisheries in the sea-waters of the Territory, etc., are to be free to all citizens of the United States subject to vested rights, construed in the light of this contention will be found to be consistent within itself. The two portions of Section 95 are distinct and indicate that rights claimed under old statutes which had not been confirmed by the Land Commission award were not considered by Congress to be vested rights. Any other construction would render the section meaningless, because it would leave nothing upon which it could operate.

It is respectfully submitted that the judgment of the Supreme Court of the Territory of Hawaii should be affirmed.

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